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No. 91-1643

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE AND THE CITY OF LOS ANGELES,
Petitioner,
VS.
VIVIANA MCCALDEN, AS ADMINISTRATOR OF THE ESTATE OF DAVID MCCALDEN,
Respondent.

BRIEF OF THE ANTI-DEFAMATION LEAGUE ON BEHALF OF ITSELF AND THE NATIONAL ASSOCIATION OF EVANGELICALS, THE CHRISTIAN LEGAL SOCIETY, THE AMERICAN JEWISH CONGRESS, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, AND THE JEWISH COMMUNITY RELATIONS COMMITTEE, JEWISH FEDERATION COUNCIL OF GREATER LOS ANGELES, *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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This brief is submitted with the consent of the parties. Originals of the letters reflecting such consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

INTERESTS OF THE AMICI CURIAE

The amici, national civic and religous organizations, are strongly committed to the First Amendment freedom of expression. But this is not merely as a matter of principle. The amici *depend* on the freedom of expression to carry out their various and sometimes controversial missions on a day to day basis. Although

they are not always on the same side of the substantive issues, the amici join in urging a grant of certiorari in this important and disturbing case. The Ninth Circuit decision below opens the door to a burdensome and truly chilling wave of tort litigation against amici and others for the mere exercise of their First Amendment freedoms.

Amicus Anti-Defamation League ("ADL") was organized in 1913 to advance goodwill and understanding among Americans of all races and creeds, and to combat racial and religious prejudice in the United States. ADL is dedicated to exposing and counteracting anti-Semitism and bigotry of every kind and promoting and protecting civil rights and liberties.

ADL implements its mandate by educating and informing the Jewish community and the general public about prejudice and discrimination. One major component of ADL's program is communication regarding extremists and hate groups or others whose actions and philosophies pose a threat to the mutual respect and tolerance upon which the survival of our diverse and pluralistic society depends.

In pursuing its fight against racism, anti-Semitism, and other forms of bigotry, ADL has long relied on the free speech guarantee of the First Amendment. Experience has shown that best antidote for "bad speech" is more speech, and that when hatred and bigotry are exposed, the vast majority of Americans will reject them. Yet ADL's speech activities often involve contractual relationships, as when racist groups have been given platforms in concert halls or on media broadcasts, or their literature has been given space in bookstores. From this perspective, the ADL respectfully offers the Court its expertise on the impact the threat of contract interference litigation can have on the exercise of First Amendment rights and the appropriate balance which should be struck between the free speech and contractual rights at issue in this case.

The other amici have similar concerns. Amicus National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals. It includes some 45,000 churches from

74 denominations and serves a constituency of approximately 15 million people.

Amicus Christian Legal Society ("CLS") is a nonprofit professional association, founded in 1961, with a nationwide membership of 4,000 Christian attorneys, law students, law professors, and judges. The CLS also has a legal information and advocacy arm, the Center for Law & Religious Freedom, founded in 1979.

NAE and CLS are both extremely disturbed by the prospect of harassing litigation against them, or any other civic or religious organization, under the theories sanctioned by the Ninth Circuit's decision below. NAE and CLS engage in advocacy on a broad range of issues including abortion, condom distribution, and public school textbooks. As many of these issues involve contractual relationships, the Ninth Circuit's decision threatens to allow NAE's and CLS's First Amendment advocacy to be attacked through burdensome tort litigation.

Also joining in these concerns and this brief are other major Jewish organizations. The amicus American Jewish Congress ("AJC") was founded in 1918 to protect the civil, economic, political, and religious rights of American Jews. AJC's ability to fulfill this role depends on its ability to speak freely and vigorously. The decision of the Ninth Circuit below impinges on AJC's freedom to speak.

In addition, amicus National Jewish Community Relations Advisory Council ("NJCRAC") is an umbrella organization consisting of the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's League for Conservative Judaism, Women's American ORT, as well as 117 community member organizations (see Appendix) representing all major Jewish communities in the United States. As the national planning and coordinating body for the Jewish community-relations field, dedicated to preserving the security of

the Jewish community and of the principles embedded in the Bill of Rights, the NJCRAC believes that freedom of expression is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

Finally, amicus Jewish Community Relations Committee, Jewish Federation Council of Greater Los Angeles, an umbrella organization representing some 500 community agencies in the Greater Los Angeles area, joins in this brief separately given its special interest in and familiarity with the area where the instant case arose. Human relations agencies in Los Angeles have their work cut out for them, and can ill afford the additional burdens of reactive litigation just for speaking out forcefully on public issues that happen to involve contracts.

ARGUMENT

I.

AN EXCEPTIONALLY IMPORTANT ISSUE OF CONSTITUTIONAL LAW IS RAISED BY THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT REINSTATING RESPONDENT'S CLAIM OF INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP.

A. THE HOLDING OF THE NINTH CIRCUIT HAS SIGNIFICANT NATIONAL IMPLICATIONS FOR THE EXERCISE OF FIRST AMENDMENT FREEDOMS.

An essential teaching of *New York Times v. Sullivan*, 376 U.S. 254 (1964), is that state tort law carries no "talismanic" power to limit the reach of First Amendment freedoms. Id. at 269. Instead the application of tort sanctions must itself "be measured by standards that satisfy the First Amendment." Id.

In the present case a dividend panel of the United States Court of Appeals for the Ninth Circuit ignored this fundamental teaching. Over strenuous constitutional objection,[1] and without any

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[1] *See* Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier, at 14-41.

First Amendment analysis whatever, the panel reinstated respondent's claim of tortious interference with contract. *See* 919 F.2d 538, 543 (9th Cir. 1990). Only in response to the powerful dissents of Judges Kozinski and Reinhardt from an order rejecting petitioners' suggestion for rehearing en banc did the panel see fit casually to observe that "liability for interference with contractual relations" must be predicated upon "[s]peech or conduct that falls outside the protection of the First Amendment . . ." Appendix to Petition for Writ of Certiorari ("App.") at A7 n.4.

The constitutionally important question, of course, is exactly what speech interfering with contractual relations is protected by the First Amendment. The panel opinion makes no effort to address this question, whose vivid significance is manifest in this very case, in which speech about matters of high public concern has been circumscribed and chilled because of its negative impact on a contractual relationship.

Vital expression about public issues will often impair contractual relationships.[2] This is frequently the very purpose and effect of efforts to disseminate "information concerning the facts of a labor dispute," *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), *Debartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568 (1988), or of efforts to persuade others to support demands for "Racial Justice." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 898-901 (1982). It may be the purpose and effect of legal and peaceful demonstrations organized by groups seeking to dissuade medical clinics from performing abortions, or of informational leafletting designed to pressure local supermarkets to cease selling pesticide-treated food. To crudely

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[2]The tort of contractual interference does not require an actual breach of contract:

> Plaintiff need not allege an actual or inevitable breach of contract in order to state a claim for disruption of contractual relations. We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome.

Pacific Gas & Electric Co. v. Bear Stearns Co., 50 Cal.3d 1118, 1129 (1990).

cabin speech about matters of public concern within the ring of existing contractual relationships would be to abandon the First Amendment aspiration to protect "the right to differ as to things that touch the heart of the existing order." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943).

The precise constitutional question posed by this case, then, is whether and under what circumstances speech negatively affecting contractual relations may be penalized by a tort. Lack of clarity on this question chills speech, as amicus Anti-Defamation League ("ADL") has reason to know firsthand. A primary institutional mission of the ADL is to oppose all forms of anti-Semitic propaganda. This mission sometimes entails the disagreeable task of informing bookstores of the anti-Semitic nature of books they have contracted to sell, or radio stations of the anti-Semitic nature of the programs they have contracted to broadcast, or concert halls of the anti-Semitic nature of the speakers they have contracted to feature. Although this speech involves matters of public concern, it is fettered and constrained by uncertainty over the reach of the tort of contractual interference. ADL is forced to "steer far wider of the unlawful zone" for fear of potential liability. *Speiser v. Randall,* 357 U.S. 513, 526 (1958). The decision of the Ninth Circuit in this case will deepen this inhibition.

ADL's experience is by no means unique. Members of amicus National Association of Evangelicals or of amicus Christian Legal Society, for example, may have occasion to demonstrate against school boards' contracts to distribute condoms or to purchase particular textbooks. The opinion of the Ninth Circuit casts a pall of imprecision deeply inhibiting to these protected First Amendment activities. In fact all the amici joining this brief believe, despite their occasional political differences, that a similar chill will extend to any advocacy group that stakes out strong positions in matters of passionate public controversy.

It is a matter of constitutional moment, therefore, that the relationship between First Amendment freedoms and the tort of contractual interference be clearly and precisely articulated. That is why Judge Kozinski in his dissent characterized this case as one "of exceptional importance." App. at A39.

B. THE DECISION OF THE NINTH CIRCUIT APPLIES A PATENTLY INCORRECT FIRST AMENDMENT STANDARD.

The tort of interference with contractual relationships does not commonly raise serious constitutional issues because its usual function is to regulate commercial behavior. That is plainly not the function of the tort in this case, however, where, as the Ninth Circuit noted, the Complaint contains no allegation of "some identifiable pecuniary or economic benefit accrue[d] to defendants that formerly accrued to plaintiff," App. at A6, and where the behavior at issue consists primarily of noncommercial speech about matters of public concern. Given these two conditions, the reach of the tort's sanctions must constitutionally be defined with that "precision of regulation" that is "the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963).

The essence of the applicable First Amendment standard was set forth by this Court in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 918 (1982): "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." The tort of contractual interference imposes damages on the basis of conduct whose "proximate result" is the impairment of a contract. *Abrams & Fox, Inc. v. Briney,* 39 Cal.App.3d. 604, 608 (1974).[3] It follows directly from *Claiborne Hardware* that if the conduct alleged to have proximately caused the impairment of a contract of speech, and if the speech is itself "protected activity," the application of the tort is forbidden by the First Amendment.

Application of this standard obviously bars many of the allegations in the instant Complaint. Even the Ninth Circuit panel recognized (although belatedly) that the efforts of defendants American Jewish Committee, Simon Wiesenthal Center, Inc., and Rabbi Marvin Hier (hereinafter referred to collectively as "petitioners") to lobby city and state officials are "plainly pro-

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[3]*See H & M Assoc. v. City of El Centro,* 109 Cal.App.3d 399, 405 (1980); *Restatement of the Law of Torts (Second)* Section 766 (1977).

tected by the First Amendment," and hence that the allegations that these efforts proximately caused an impairment of contract are constitutionally prohibited. *Compare* App. at A7 n.4 *with* App. at A65-A66, A68 (Plaintiff's Second Amended Complaint Nos. 27-28, 36-37).

Although the Panel's opinion is not entirely clear, it apparently rejected petitioners' First Amendment defense because it found that

> Liberally construed, the complaint contains one allegation of a specific threat — the AJC's alleged statement to the CLA [California Library Association], "at the urging and request and with the knowledge, approval and cooperation of Defendants Marvin Hier ... and Simon Wiesenthal Center" that if the contracts with appellant were not canceled, "[d]efendant CLA's 1984 Annual Conference would be disrupted, there would be damage to property and the CLA would be 'wiped out' "[4]

App. at A9. The exact meaning of this "specific threat," however, requires some clarification.

Respondent herself has acknowledged that the phrase "wiped out," which appears in paragraph 24 of the Second Amended Complaint (App. A65), comes from a newspaper article that refers to the potentially devasting effects on CLA of "organized Jewish demonstrations." Appellant's Brief before the United States Court of Appeals for the Ninth Circuit, at 32-35. And the Ninth Circuit Panel makes clear in its opinion that its discussion of property damage and disruption refers to petitioners' alleged threat "to disrupt [plaintiff's] presentation by creating a demonstration that [petitioners] knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and members of Defendant CLA'." App. at A10. *See* Second Amended Complaint No. 32, at App. A67.

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[4]The passage quoted in text comes from the section of the Panel's opinion that discusses the violation of the Unruh Act. We assume that the Ninth Circuit would apply the same analysis to the tort claim.

The conduct which the Ninth Circuit found unprotected by the First Amendment, therefore, consists of "threats" to engage in effective and potentially violent demonstrations. It is clear, however, the demonstrations are constitutionally protected, even if accompanied by a "reasonably probability" of property damage and violence, so long as such damage and violence neither occurs nor is imminently incited. *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969). That is the lesson of *Terminiello v. Chicago*, in which this Court unequivocally extended constitutional immunity to an assembly that "stirred people to anger, invited public dispute, or brought about a condition of unrest," 337 U.S. 1, 5 (1949), even in the context of "a riot and . . . speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two." Id. at 13 (Jackson, J., dissenting).

Petitioners would thus be constitutionally immune from liability for contractual interference if the CLA had canceled the contract because petitioners had staged a tempestuous, unruly but ultimately nonviolent demonstration. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 915-20 (1982). Hence the Ninth Circuit is forced into the anomalous position of concluding that petitioners' "threat" to hold such a demonstration is constitutionally less protected than the demonstration itself. This position is surely incorrect, for if a demonstration is constitutionally protected from the regulation of tort law, so also must be the stated intention to engage in the demonstration.

It is true that the recipient of a "threat" of a potentially disruptive demonstration might breach a contractual relationship because of his fear that the demonstration might turn violent, rather than because of the persuasive power of the demonstration itself.[5] But is is constitutionally unacceptable to convert the

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[5]In this context the concept of "persuasion" must be broadly construed. As this Court stated in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971): "The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper."

recipient of such a "threat" into a censor of precious First Amendment rights. The call for constitutionally protected activity must itself be constitutionally protected. *New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 266. If petitioners had circulated leaflets calling for demonstrations against CLA's agreement with plaintiff, and if these leaflets had themselves caused CLA to breach the contract, petitioners could not constitutionally be held liable for the tort of contractual interference. It would be a matter of indifference whether CLA's breach had been caused by the persuasive power of the potential demonstrations or instead by a fear of their possible violence.

In effect, therefore, the holding of the Ninth Circuit cedes everything to the anxieties of an auditor, and it offers nothing to the rights of a speaker to announce intentions to engage in constitutionally protected activity. It thus subordinates speech to "undifferentiated fear or apprehension," which, "in our system, . . . is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969).[6] It follows that one must distinguish between an expression that communicates an actual threat of violence and an expression that announces an intention to engage in protected activity which an auditor fears might turn violent. The latter merits constitutional protection; the former does not.

The question posed by this case is how these two forms of expression may be constitutionally distinguished. When speech occurs in the course of volatile political controversy, this Court has been careful to hold that the distinction between protected and unprotected speech must be drawn clearly and precisely:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence or by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded.

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[6]The Ninth Circuit holding has the further and serious disadvantage of creating an incentive to express fundamental disagreements through demonstrations that may actually turn violent, rather than through the admittedly peaceful conveyance of information about such demonstrations.

NAACP v. Clairborne Hardware Co., 458 U.S. 886, 916 (1982). Precise regulation serves the important function of minimizing the chill on protected speech.

This function would not be served by a rule that uses the reactions of an auditor to distinguish between protected "threats" of potentially disruptive demonstrations and unprotected threats of violence. Such a rule would hold a speaker hostage to the apprehensions of his addressee, and would have particularly perverse consequences in a context like this, where an auditor has every incentive to "hear" threats of violence so as to establish a barrier against a subsequent suit for breach of contract, or at least so as to set up a potential indemnitor.

In analogous situations this Court has achieved the requisite degree of legal precision by distinguishing protected from unprotected speech through some form of *scienter* requirement. The classic example is defamation, where the "actual malice" rule demands that a public official or public figure plaintiff prove that a "defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 729 (1968). This Court invoked a similar solution to the problem of avoiding the chill that would result from imposing sanctions "solely because of a citizen's association with an unpopular organization," for it interpreted the Constitution as demanding proof "establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy v. James*, 408 U.S. 169, 186 (1972). And, in order to avoid the "self-censorship" that would occur if booksellers were held strictly liable for possessing obscene writings, this Court has held that the First Amendment mandates that any "constitutionally permissible prosecution" include some form of a "scienter requirement." *Smith v. California*, 361 U.S. 147, 154 (1959).

In the circumstances of this case, therefore, the First Amendment ought analogously to require that the distinction between protected and unprotected speech be located in the intentions of the speaker. Petitioners have a right to constitutional protection if their intent was merely to affect the relevant contractual relationship by virtue of proposed demonstrations, however volatile; but

they have no such right if their intent was instead to affect the contract rights through threats of violence.

C. APPLICATION OF THE CORRECT FIRST AMENDMENT STANDARD REQUIRES THAT THE CLAIM OF TORTIOUS INTERFERENCE WITH CONTRACT BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6).

This is not a case in which the tort of contractual interference involves the regulation of commercial affairs. There is no claim here of economic advantage. Because the speech involved in this case is concededly about matters of vivid public concern, the First Amendment requires allegation and proof of an interference with contract through speech that intended to threaten violence, as distinguished from speech that merely "threatened" demonstrations carrying the potential for violence. Just as a complaint for defamation by a public figure will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim if it fails to allege the First Amendment requirement of actual malice, *see, e.g., Church of Scientology Intern v. Eli Lilly & Co.*, 778 F.Supp. 661, 666 & n.3 (S.D.N.Y. 1191); *Lasky v. American Broadcasting Co., Inc.*, 606 F.Supp. 934, 937 (S.D.N.Y. 1985); *Barger v. Playboy Enterprises, Inc.*, 564 F.Supp. 1151, 1156-57 (N.D. Cal. 1983), *aff'd,* 732 F.2d 163 (9th Cir.), *cert. denied,* 469 U.S. 853 (1984), so also should a complaint for tortious interference with contract be dismissed if it fails to allege the First Amendment requirement of scienter or specific intention.

In this case, as the panel of the Ninth Circuit stated, even the most generous interpretation of the Complaint can find only the allegation that petitioners "intended to disrupt [plaintiff's] presentation by creating a demonstration that appellees knew and intended 'would create a reasonable probability of property damage and of violence against Plaintiff and the members of Defendant CLA.'" App. at A10. There are no claims that petitioners "authorized, directed, or ratified" violence.[7] *NAACP v. Claiborne*

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[7]The only allegations even vaguely pertinent to such claims are that the petitioners rented a conference room in the Westin Bonaventure Hotel during the evening when plaintiff planned to present his program,

Hardware Co., 458 U.S. 886, 927 (1982). There are no claims, as Judge Kozinski pointed out in his dissent, that petitioners "threatened to break anybody's kneecaps, or to plant a bomb, or to have goons set fire to [plaintiff's] exhibit." App. at A41. There are no claims that the demonstrations planned by petitioners were not bona fide expressions of political conviction, or that petitioners' references to these demonstrations were actually meant to convey threats of violence, as distinguished from "threats" to assemble in ways that carried the potential for violence.

It follows that the decision of the Ninth Circuit Court of Appeals was incorrect, and that the federal district court was justified in dismissing respondent's claim for tortious interference with contract pursuant to Fed. R. Civ. P. 12(b)(6).

II.

A CLOSELY RELATED ISSUE OF CONSTITUTIONAL LAW IS RAISED BY THE HOLDING REINSTATING THE CLAIM UNDER CALIFORNIA CIVIL CODE SECTION 51.7.

California Civil Code Section 51.7, popularly known as the Unruh Act, provides:

> All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property, because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

Second Amended Complaint §§ 29-30, App. at A66-A67, and that petitioners informed certain "militant" Jewish organizations about the content of his "exhibit and program." Second Amended Complaint §§ 34-35, App. at A67-A68. Even if these allegations were accepted as true, they would obviously not establish that petitioners authorized, directed, ratified, or even condoned violence.

The district court dismissed a claim that petitioners had violated the Unruh Act. The Ninth Circuit, over vigorous constitutional objection,[8] reinstated the claim.

The factual allegations supporting the Unruh Act claim are the same as those that support the claim for tortious interference with contract. Second Amended Complaint §§ 62-65, App. at A74-A75. The two claims thus raise essentially the same fundamental constitutional question. That question is whether a State may penalize speech which, in a context of a volatile political controversy, "threatens" to engage in constitutionally protected activity. It makes no constitutional difference whether penalties are imposed pursuant to a statute or to a common law tort. What matters is whether a State may sanction as "intimidation" the announced intention to assemble in potentially disruptive demonstrations.

Although it virtually ignored this question in its original opinion, 919 F.2d 538, 545, the Ninth Circuit panel's amended decision argues that the expression of such an intention may be penalized if it is "privately communicated," as distinguished from being broadcast through "public speeches." App. at A10-11. But this hastily constructed argument flatly contradicts *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979), which holds that First Amendment protections extend to speech "communicate[d] privately" as well as to speech "spread . . . before the public." The constitutionally decisive question is whether speech involves matters of public concern, not whether it is disseminated through public or private channels. The speech at issue in this case clearly does involve matters of public concern.

The decision of the Ninth Circuit, if left standing, will transform the Unruh Act into an instrument of repression, ready for use by controversial groups willing to employ litigation to silence those who would assemble to oppose them. The breadth of this interpretation of the Unruh Act, far exceeding the inherently more limited scope of the tort of contractual interference, ought

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[8] *See* Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier, at 14-41.

to be deeply disturbing to those who care to preserve the vital national debate guaranteed by the First Amendment.

Because there is no allegation here that petitioners intended to threaten violence, as distinguished from "threatening" to engage in demonstrations that carried the potential for violence, the decision of the Ninth Circuit Court of Appeals was incorrect. The claim for violation of the Unruh Act ought to have been dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

III.

CONCLUSION

This case raises exceptionally important issues of First Amendment law. The decision of the Ninth Circuit gave only the most casual and inadequate attention to these issues, and as a consequence reached conclusions that are deeply inconsistent with essential principles of freedom of expression. The effect of the Ninth Circuit decision is likely to be profound and far-ranging. We therefore respectfully urge this Court to grant certiorari in this case.

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APPENDIX

MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles CRC of Jewish Federation-Council
Oakland Greater East Bay JCRC
Orange County Jewish Federation
Sacramento JCRC
San Diego CRC of United Jewish Federation
San Francisco JCRC
Greater San Jose JCRC
Greater Bridgeport Jewish Federation
Greater Danbury CRC of Jewish Federation
Eastern Connecticut Jewish Federation
Greater Hartford CRC of Jewish Federation
New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council

Metropolitan Chicago JCRC of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis JCRC
South Bend Jewish Federation of St. Joseph Valley
JCRC of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater Baton Rouge Jewish Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation-
Community Council
Baltimore JCRC
Greater Boston JCRC
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit JCC
Flint Jewish Federation
Minneapolis Minnesota and Dakotas JCRC-
Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis JCRC
Omaha JCR Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Clifton-Passaic Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation
Northern New Jersey JCRC
Southern New Jersey JCRC of Jewish Federation
Albuquerque JCC
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation
Elmira CRC of Jewish Welfare Fund

Greater Kingston Jewish Federation
New York JCRC
Northeastern New York United Jewish Federation
Greater Orange County Jewish Federation
Rochester Jewish Community
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
Columbus CRC of Jewish Federation
Greater Dayton CRC of Jewish Federation
Greater Toledo CRC of Jewish Federation
Youngstown JCRC of Jewish Federation
Oklahoma City JCC
Tulsa JCC
Portland Jewish Federation
Allentown CRC of Jewish Federation
Erie JCC
Greater Philadelphia JCRC
Pittsburgh CRC of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish Community Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation

Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council